88-1372

(2)

Supreme Court, U.S.
FILED
FEB 16 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term 1988

COMUNI-CENTRE BROADCASTING, INC.,

Petitioner

v.

FEDERAL COMMUNICATIONS COMMISSION,

Respondent

APPENDIX
TO
PETITION FOR WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued March 17, 1988
Decided September 16, 1988

No. 87-1331

COMUNI-CENTRE BROADCASTING, INC.,
Appellant

v.

FEDERAL COMMUNICATIONS COMMISSION

MIAMI 35, CORP.
MIAMI LATINO BROADCASTING CORPORATION
FIRST LATIN WOMEN BROADCASTING,
Intervenors

On Appeal from Orders of the
Federal Communications Commission

Roy F. Perkins, Jr., for appellant.

David Silberman, Counsel, Federal Communications Commission, with whom Diane S. Killory, General Counsel, and Daniel M. Armstrong, Associate General Counsel, Federal Communications Commission, were on the brief, for appellee.

Thomas L. Root entered an appearance for intervenor Miami 35 Corporation.

Howard A. Topel and Rachel D. Cramer were on the brief, for intervenor Miami Latino Broadcasting Corporation.

Stephen Diaz Gavin entered an appearance for intervenor First Latin Women Broadcasting, Inc.

Before ROBINSON and D. H. GINSBURG, Circuit Judges, and KAUFMAN*, Senior District Judge.

Opinion for the Court filed by Circuit Judge ROBINSON.

ROBINSON, Circuit Judge: This appeal arises out of a comparative proceeding before the Federal Communications Commission for permit to construct a new television station in Miami, Florida. The application of appellant, Comuni-Centre Broadcasting, Inc., was dismissed following its failure to file proposed findings of fact and conclusions of law within the time allotted by the hearing officer. Perceiving no basis for holding the dismissal improper, we affirm.

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* Of the United States District Court for the District of Maryland, sitting by designation pursuant to 28 U.S.C. §294(d).

I

This proceeding initially involved 21 applicants, including Comuni-Centre. A hearing, conducted in two phases by an administrative law judge (ALJ), was concluded on July 18, 1985, at which time the ALJ directed all applicants to file proposed findings of fact and conclusions of law by September 4 following. On August 28, seven applicants, including Comuni-Centre, with the consent of the remaining parties, jointly moved for enlargement of the filing period to September 18. The motion was granted in part, and the time for filing was extended to September 11.

Although all other applicants served their findings and conclusions on September 11, Comuni-Centre failed to do so.[1] On September 17, a competing applicant,

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1 At that time, in addition to Comuni-Centre, twelve other applicants remained in the proceeding.

Range Communications, moved to dismiss Comuni-Centre from the proceeding for failure to prosecute. On September 23, twelve days after the deadline, Comuni-Centre tendered its proposed findings and conclusions, together with a motion to accept its late filing and an opposition to Range's motion to dismiss.

By memorandum opinion and order, the ALJ denied Comuni-Centre's motion and dismissed its application with prejudice.[2] The ALJ concluded that Comuni-Centre had not shown good cause for failing to file on time and had "prejudiced the rights of other applicants by disrupting preparation of reply findings".[3] Accordingly, Comuni-Centre was held to have forfeited its right to participate further in the

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2 Cuban-American Ltd., F.C.C. 85M-3938 (Oct. 9, 1985) (memorandum opinion & order) Joint Appendix (J. App.) 364 [hereinafter ALJ Order].

3 Id. at 3, J. App. 366.

proceeding.[4]

On appeal, the Review Board affirmed, concluding that the presiding officer had acted properly and within the scope of his authority when he dismissed Comuni-Centre's application.[5] The Board agreed that Comuni-Centre had not shown good cause for its late proffer and, while acknowledging the danger of applying the "blunderbuss of dismissal" for procedural deficiencies,[6] stressed the need for sensitivity to the administrative imperatives of complex multiparty proceedings and to "the wages of a cavalier attitude

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4 Id.

5 Cuban-American Ltd., 102 F.C.C.2d 1238 (Rev. Bd. 1985) [hereinafter Review Bd. Order].

6 Id. at 1241 (citing WADECO, Inc. v. FCC, 202 U.S.App.D.C. 122, 133, 628 F.2d 122, 133 (1980) (dissenting opinion) (warning against indiscriminate use of "blunderbuss of disqualification" in other than egregious applicant-misconduct cases)).

toward the hearing process".[7] The Board noted that the dismissal was not based on an "inconsequential, trivial, or otherwise excusable single [text as amended by the Court's Order, in the nature of an erratum, filed Sept. 21, 1988] lapse",[8] but rather was a response to Comuni-Centre's "serious and prejudicial filing dilatoriness, which was several months in the making and typical of a general intractability in th[e] proceeding".[9]

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7 102 F.C.C.2d at 1241.

8 Id. (citing Jackson v. Washington Monthly Co., 186 U.S.App.D.C. 288, 569 F.2d 119 (1977) (reviewing District Court's dismissal of civil action)).

9 102 F.C.C.2d at 1242. The Board distinguished its decision from another issued on the same day, Horizon Community Broadcasters, Ltd., 102 F.C.C.2d 1267 (Rev. Bd. 1985), in which it reversed the dismissal of an application where the proposed findings were tendered only six days late and were attributable to a computer problem. In Horizon, no pattern of intractable conduct was established, and the ALJ had acted without waiting

Comuni-Centre's application for review by the Commission was denied without opinion.[10] In a footnote to the order, however, the Commission did reverse the Board on one aspect of its decision. The Board had concluded,[11] as had the ALJ,[12] that by filing late Comuni-Centre had acquired an unfair opportunity to review the timely-filed findings and conclusions of the other applicants before proffering its own. The Commission, however, accepted the declarations of Comuni-Centre's attorneys that they had not availed themselves of this oppor-

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for the applicant's response to the dismissal motion.

10 Cuban-American Ltd., 1 F.C.C. Rcd. 449 (1986) [hereinafter Commission Order].

11 Review Bd. Order, supra note 5, 102 F.C.C.2d at 1241.

12 ALJ Order, supra note 2, at 3, J. App. 366.

tunity.[13] Nevertheless, the Commission considered this error to be harmless in that it did not significantly undercut the conclusion that acceptance of Comuni-Centre's tardy presentation would have had a disruptive effect on the proceeding.[14]

A subsequent petition for reconsideration was denied by the Commission on the ground that it did not rely upon any new fact or changed circumstance as required by the Commission's rules.[15] Comuni-Centre then appealed to this court.[16]

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13 Commission Order, supra note 10, 1 F.C.C. Rcd. at 449 n. 1.

14 Id.

15 Cuban-American Ltd., F.C.C. 87I-062 (order) (June 16, 1987), J. App. 482; see 47 C.F.R. §1.106(b) (1987) (standards governing disposition of petitions for reconsideration). We agree that these standards were not met by Comuni-Centre's petition for reconsideration.

16 This appeal is taken pursuant to 47 U.S.C. §402(b) (1982).

II

The Communications Act directs review of Commission order and decisions in the manner prescribed by Section 706 of the Administrative Procedure Act (APA).[17] Our role, therefore, is to determine whether the agency's action in this case was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law".[18] Comuni-Centre argues that it showed good cause for the acceptance of its belated filing and that dismissal of its application was an inappropriate exercise of discretion.

The Commission has adopted rules dealing specifically with presentations of proposed findings and conclusions by parties to a proceeding. The presiding officer has authority to determine whether

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17 Id. §402(g).

18 5 U.S.C. §706(2)(a) (1982).

such proposals will be required and when their filing will become due.[19] The rules

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19 47 C.F.R. §1.263(a) (1987) provides:

> Each party to the proceeding may file proposed findings of fact and conclusions, briefs, or memoranda of law: Provided, however, That the presiding officer may direct any party other than Commission counsel to file proposed findings of fact and conclusions, briefs, or memoranda of law. Such proposed findings of fact, conclusions, briefs, and memoranda of law shall be filed within 20 days after the record is closed, unless additional time is allowed.

Delving into the legislative history of the APA and the Attorney General's Manual thereon, Comuni-Centre posits that parties have an "opportunity" to submit findings, but may not be "required" to do so as a precondition to receiving a decision on the merits of an application. Brief for Appellant at 22-27. Comuni-Centre also argues that such a requirement cannot lawfully be imposed without advance notice, "specifically, notice before a party proceeds with the expense and effort of proceeding through a hearing". Id. at 26-27 (emphasis in original). We must note the wide latitude a judicial or quasi-judicial officer has to determine the best manner in which to conduct proceedings such as those involved here. See Salzer v. FCC, 250 U.S.App.D.C. 248, 252, 778 F.2d

provide explicitly that absent a showing of good cause for failure to meet a filing deadline, an untimely submission of a proposal may be treated as a waiver of the right to further participation in the proceeding,[20] and as ground for dismissal.[21]

869, 873 (1985). There is nothing either in the APA or the Communications Act that prohibits a presiding officer from requiring all parties to submit proposed findings of fact and conclusions of law. Indeed, the Communications Act provides that "[t]he Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice". 47 U.S.C. §154(j) (1982). Nor do we see how Comuni-Centre can claim lack of notice when the specter of dismissal is plainly evident in the Commission's rule. See note 20 infra. Moreover, it appears that these arguments were not addressed to the agency and therefore are not available for our consideration. See Washington Ass'n for Television & Children v. FCC, 229 U.S.App.D.C. 363, 366-367, 712 F.2d 677, 680-681 (1983).

20 "In the absence of a showing of good cause therefor, the failure to file proposed findings of fact, conclusions, briefs, or memoranda of law, when directed to do so, may be deemed

In reviewing the dismissal of an applicant from a comparative proceeding, we think it clear that among the factors appropriate for consideration are the applicant's proffered justification for the failure to comply with the presiding officer's order, the prejudice suffered by other parties, the burden placed on the administrative system, and the need to punish abuse of the system and to deter future misconduct.[22] We bear these

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a waiver of the right to participate further in the proceeding". 47 C.F.R. §1.263(c) (1987).

21 "Failure to prosecute an application, or failure to respond to official correspondence or request for additional information, will be cause for dismissal. . . [S]uch dismissal will be without prejudice where an application has not yet been designated for hearing, but may be made with prejudice after designation for hearing". Id. §73.3568(b).

22 Cf. Shea v. Donohoe Constr. Co., 254 U.S.App.D.C. 175, 178, 795 F.2d 1071, 1074 (1986) (discussing factors influencing propriety of dismissal of

criteria in mind as we proceed to examine the grounds assigned by the agency for dismissing Comuni-Centre's application. We note at the outset that Communi-Centre's filing, which was twelve days late, exceeded by five days the deadline which it and others proposed to the Commission. Moreover, even after it had become apparent that Comuni-Centre would not file on time, no further request for an extension was made, nor was the presiding officer alerted to the fact that the filing would be late.

Comuni-Centre argues that it was not afforded a reasonable opportunity to prepare its findings and conclusions in light of the voluminous record in this case and the 55-day period between the conclusion of the hearing and the final

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civil action when plaintiff is unaware of attorney's neglect).

deadline.[23] It complains of competing work priorities and the fact that its representative is a two-lawyer firm. The Review Board found these justifications insufficient, particularly in the absence of any explanation why additional staff was not enlisted or priorities rearranged.[24] Furthermore, all other parties to the proceeding - some of which were also served by small law firms and many of which, it is fair to assume, labored under competing professional obligations- submitted their proposals within the time allotted. We note also that at the culmination of the initial phase of the hearing on June 25, 1985, when ninety percent of the proceedings had been

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23 The preparation time actually allowed was 35 days longer that the 20-day allotment granted by the Commission's rules. See 47 C.F.R. §1.263(a) (1987), quoted supra note 19.

24 Review Bd. Order, supra note 5, 102 F.C.C.2d at 1240.

concluded, the ALJ warned the parties to begin work on their findings and conclusions immediately instead of waiting until the hearing ended in July.[25] In spite of that warning, Comuni-Centre did not commence preparation until August 21, only two weeks before the original due date.

In addition, the Review Board concluded,[26] as had the ALJ,[27] that Comuni-Centre's tardiness disrupted other applicants' preparation of reply findings. Comuni-Centre attempts to dispute this point by taking exception to an opponent's

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25 The ALJ stated: "But here - now hear this, do not believe that you have all kinds of time to prepare a set of findings, because when those - when phase two or even if there is a brief phase three is over, time will have run considerably on you". Transcript of Hearing at 4037-4038, J. App. 144-145.

26 Review Bd. Order, supra note 5, 102 F.C.C.2d at 1241.

27 ALJ Order, supra note 2, at 3, J. App. 366.

assertion that none of the other parties' reply findings responded to the proposals tendered late by Comuni-Centre. Although it appears that several parties did refer, at least cursorily, to Comuni-Centre's overdue submission in their replies, it is conceded that at least four parties did not. Two applicants did not mention Comuni-Centre's findings in their replies at all, and two more chose not to reply to Comuni-Centre because its application was subject to dismissal. Furthermore, even those that did respond could well have been prejudiced by the abbreviated time period for analysis and preparation that was caused by Comuni-Centre's tardiness. Upon examination, therefore, it becomes clear that Comuni-Centre is, in effect, disputing the <u>extent</u> of the disruption, not the fact that some disruption occured.

Because of possible prejudice to other applicants, the Review Board stated

that were it to accept the late submission, it would "feel obliged to set a special reply date to overcome this disruption, which would, in turn, create further disruption".[28] This interference with normal processing brings to light a significant difference between a comparative proceeding in the administrative realm, like the one involved here, and a bipolar civil action in a district court. Unlike the latter, which is concerned with adjudication of the private rights of litigants, a comparative licensing case has the interest of the public as its focus. That interest is furthered by expeditious selection of a qualified applicant, who will serve the public by operating the broadcast facility involved. This concern for the public interest therefore informs our consideration of the

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28 Review Bd. Order, supra note 5, 102 F.C.C.2d at 1241.

disruption visited upon the agency by an applicant's delay.[29]

The Review Board stressed that Comuni-Centre's dismissal was the consequence of a pattern of casual and dilatory conduct, not the result of "inconsequential, trivial or otherwise excusable single lapse".[30] Similarly, the ALJ had stated that he had been "overly indulgent with Comuni-Centre and [had] bent over backwards to accomodate Comuni-Centre's trial tactics", which he charac-

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29 "Congress clearly recognized that sound regulation has procedural as well as substantive elements, and that the 'public interest, convenience, and necessity' comprehends both. Orderliness, expedition, and finality in the adjudicating process are appropriate weights in the scale, as reflecting a public policy which has authentic claims of its own". Valley Telecasting Co. v. FCC, 118 U.S.App.D.C. 410, 413, 336 F.2d 914, 917 (1964).

30 Review Bd. Order, supra note 5, 102 F.C.C.2d at 1241.

terized as dilatory.[31] Thus, at both levels, the dismissal was bottomed, not on any single incident, but rather on a pattern of procrastination; and in that respect the treatment concentrated on a factor deemed almost indispensable to parallel dismissals in the judicial context.[32]

As just one example of Comuni-Centre's dilatory conduct, the ALJ cited its handling of an air hazard clearance awarded by the Federal Aviation Administration. The clearance was issued on September 9, but Comuni-Centre did not present it to the Commission until September 23, and even then without explana-

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31 ALJ Order, supra note 2, at 2 n.2, J. App. 365.

32 See Link v. Wabash R. R., 370 U.S. 626, 633-634 & n. 11, 82 S.Ct. 1386, 1390-1391 & n. 11, 8 L.Ed.2d 734, 740 & n. 11 (1962); Jackson v. Washington Monthly Co., supra note 8, 186 U.S.App.D.C. at 290, 569 F.2d at 121.

tion for the delay. Moreover, the form in which it was submitted - through a request for official notice - did not conform to the three-step procedure required by the ALJ: petitioning to reopen the record, acceptance of the clearance into evidence, and reclosing of the record. The ALJ commented:

> Long after this record was closed (July 18, 1985), reopened and re-closed, and after the other applicants had filed their proposed findings on the air hazard issue (September 11, 1985), Comuni-Centre proffers an air hazard clearance. And even then it failed to properly proffer that clearance. No adjudicatory proceedings, especially one this large, can be run under such circumstances.[33]

To further bolster the conclusion that Comuni-Centre has been lax throughout this proceeding, the ALJ cited numerous occasions upon which its lateness had necessitated acceptance of untimely

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33 ALJ Order, supra note 2, at 3, J. App. 366 (citations and footnote omitted).

notices of depositions, motions to produce, petitions to enlarge issues, oppositions to the petitions of other parties, and replies to oppositions.[34] Though Comuni-Centre argues that in several instances the filings were only one day tardy,[35] they nonetheless necessitated consideration and responsive action by the ALJ as well as by the remaining parties.

It is clear that Comuni-Centre had ample advance warning that late filing of its proposed findings of fact and conclusions of law might become cause for its dismissal from the proceeding.[36] At the conclusion of the hearing, the following colloquy ensued between the ALJ and

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34 Id. at 2 n.2, J. App. 365.

35 Reply Brief for Appellant at 2.

36 We do not mean to imply that awareness of a possible consequence of an untimely filing need be that specific.

Comuni-Centre's attorney:

> [Counsel]: Well, Your Honor, could I ask you a question. You are directing every applicant to file findings?
>
> [Judge]: I am so directing every applicant to file the findings that I have previously described.
>
> [Counsel]: With the consequences which follow for failure to file.
>
> [Judge]: 1.263(c).[37]

The ALJ's last response was a direct reference to the Commission's regulation providing that failure to submit such proposals when ordered to do so, "may be deemed a waiver of the right to participate further in the proceeding".[38] We think it clear that a direction to file is a command to file on time.[39] In spite of

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37 ALJ Order, supra note 2, at 2, J. App. 365.

38 47 C.F.R. §1.263(c) (1987), quoted supra note 20.

39 As we have heretofore observed, the Commission's rules also provide for dismissal as a consequence of an applicant's failure to prosecute or to respond to a request for informa-

this admonition, however, Comuni-Centre missed the deadline without either seeking a further extension or notifying the ALJ that its filing would be late.[40]

In addition to this pattern of dilatory conduct, there is more than enough indication that Comuni-Centre's course of tardy activity had interfered with the orderly conduct of the proceeding and that other parties were prejudiced or would

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tion. Id. §73.3568(b), quoted supra note 21.

40 The Review Board acknowledged that in some cases sanctions less severe than dismissal might be appropriate, particularly when dismissal would penalize clients unaware of the laxity of their attorneys. Cf. Shea v. Donohoe Const. Co., supra note 22, 254 U.S.App.D.C. at 182, 795 F.2d at 1078. The Review Board stated, however, "we do not believe that Comuni-Centre may properly escape responsibility for its counsel's dilatoriness, since the filing deadline and prior litigation history were known (or should have been known) by the applicant's principals as well as its counsel". Rev. Bd. Order, supra note 5, 102 F.C.C.2d at 1242 n.4.

have been in the absence of special steps to overcome the disruption. In turn, the ALJ, the Review Board, and the Commission itself saw insufficient justification in Comuni-Centre's attribution of these difficulties to its overextended workload, and we cannot say that they were wrong. Nor, in the light of the full circumstances, can we conclude that the agency's dismissal of Comuni-Centre from the comparative proceeding was improper. The order under review is accordingly

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1331 September Term, 1988

Comuni-Centre Broadcasting, Inc.,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth B. Ginsburg, Starr, Silberman, Buckley, Williams. D. H. Ginsburg and Sentelle, Circuit Judges.

O R D E R

Appellant's Suggestion for Rehearing En Bank has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court en banc, that the suggestion is denied.

FOR THE COURT:

CONSTANCE L. DUPRE,
CLERK

By: s/Robert A.Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 87-1331 September Term, 1988

Comuni-Centre Broadcasting, Inc.,

Appellant

v.

Federal Communications Commission,

Appellee

BEFORE: Robinson, and D. H. Ginsburg, Circuit Judges and Kaufman* U. S. Senior Judge for the District of Maryland

O R D E R

Upon consideration of appellant's petition for rehearing filed October 31, 1988, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:

CONSTANCE L. DUPREE,
CLERK

By: s/Robert A. Bonner
Robert A. Bonner
Deputy Clerk

* Sitting in designation pursuant to 28 U.S.C. §294(d)

FCC 85M-3938

Before the
Federal Communications Commission
Washington, D. C. 20554

In re Applications of	)	MM Docket No.
	)	85-27
CUBAN-AMERICAN LIMITED	)	

* * * *

For Construction Permit for a New
Television Station on Channel 35
Miami, Florida

MEMORANDUM OPINION AND ORDER
Issued: October 7, 1985
Released: October 9, 1985

1. This is a ruling on three interrelated pleadings. The first is Range's Motion to Dismiss Comuni-Centre Broadcasting's application filed on September 23, 1985. Comuni-Centre opposed Range's Motion on September 23, 1985, but Spanish Broadcasting and Grace Broadcasting supported it on September 24, 1985, and Lamar Communications supported it on October 1, 1985.

2. The second pleading is a Motion to Accept Proposed Findings of Fact and Conclusions of Law that Comuni-Centre filed on September 23, 1985. Range and Grace opposed the Motion the following day, Minority Broadcasting opposed it on September 25, 1985, and Miami Broadcasting, Inc. (MBI) opposed it on September 27, 1985.

3. The third pleading is a Request for Official Notice that Comuni-Centre filked on September 23, 1985. Grace BHroadcasting opposed that Request on September 24, 1985, and Range opposed it on September 26, 1985.

4. These three pleadings present a common question: Should Comuni-Centre's application be dismissed for failing to tmely file Proposed Findings of Fact when directed to do so, or has it shown good cause for its late-filing as required by 47 C.F.R. 1.263(c)?

Background

5. Thirteen applicants remain in this TV proceeding. They seek authority to construct a new TV station on Channel 35 in Miami, Florida. A trial type hearing was conducted in June and July, 1985. At its conclusion the Presiding Officer directed all parties to file proposed findings of fact and conclusions of law on or before September 4, 1985 (Tr. 4557-4566).[1]

6. Comuni-Centre understood those instructions. In fact at Tr. 4559, Comunbi-Centre's counsel engaged the Presiding Officer as follows:

> Mr. Perkins: Well, your Honor, could I ask you a question. You are directing every applicant to file findings?
>
> Judge Miller: I am so directing every applicant to file the findings that I have previously described.

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1 See FCC 85M-2929 released July 24, 1985.

Mr. Perkins: With the consequences which follow for failure to file.

Judge Miller: 1.263(c).[2]

7. Subsequently, the initial deadline for filing proposed findings was extended for good cause from September 4th to September 11th, 1985. All the applicants except Comuni-Centre and Miami 35 met the September 11, 1985 due date. Miami 35 served its proposed findings on the other parties on September 11 and officially filed them one day late. Miami

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2 Range correctly notes that throughout this proceeding the Presiding Officer weas overly indulgent with Comuni-Centre and bent over backwards to accomodate Comuni-Centre's trial tactics (see FCC 85M-1283, released March 27, 1985; FCC 85M-1284, released March 27, 1985; FCC 85M-1443, released April 4, 1985; FCC 85M-1447, released April 4, 1985; FCC 85M-1629, released April 15, 1985; FCC 85M-1886, released April 26, 1985; and FCC 85M-1917, released April 29, 1985; also see Tr. 954, 959, 963, 982-984, 993-994, 1503, 2017-2021, 2036-2037, 2058, 2066-2070, 2648-2650 and 3202-3209).

35's brief tardiness was excused since it was apparent that it hadn't had an unfair opportunity to review the timely filings of the other eleven applicants. See FCC 85M-3645, released September 17, 1985.

8. But Comuni-Centre neither served nor filed its proposed findings on the due date. Nor did it request leave to extend the filing poeriod. Nor did it even signal that it wasn't going to file them timely. Instead twelve days later, it filed a set of Proposed Findings of Fact along with still another Motion to Accept (See Footnote 2 supra.).

Rulings

9. Comuni-Centre's Motion to Accept will be denied, and Range's motion to dismiss will be granted. All the applicants except Comuni-Centre met their filing deadline. Comuni-Centre, by filing late, has had an unfair opportunity to review the timely filings of the other

twelve applicants. Moreover, by filing twelve days later, Comuni-Centre effectively disrupted the other applicants' preparation of their Reply Findings. In brief, Comuni-Centre hasn't shown good cause for failing to file its proposed findings in a timely fashion, has prejudiced the rights of the other applicants and has waived its right to participate further in the proceeding. Its application will therefore be dismissed. See James E. Reese, 45 FCC 2d 315, 320-321 (Rev. Bd. 1974), rev. denied, FCC 74-634 released June 19, 1974; and Wolverine Radio Co., Inc., 49 FCC 2d 1038, 1039 (Rev. Bd. 1974).

10. Illustrative of Comuni-Centre's dilatory tactics is the September 23, 1985 Request for Official Notice. Long after this record was closed (July 18, 1985), reopened and reclosed (FCC 85M-3319, released August 27, 1985), and after the

other applicants has filed their proposed findings on the air hazard issue (September 11, 1985), Comuni-Centre proffers an air hazard clearance. And even then it failed to properly proffer that clearance (Tr. 14-15, 4354-4356, and 4552-4553).[3] No adjudicatory proceeding, especially one this large, can be run under such conditions.[4]

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3 Five other applicants complied with the Presiding Officer's directions regarding the air hazard issue; i. e., First Latin Women Broadcasting, Miami Latino Broadcasting Corp., Minority Broadcasting Corporation, Range and Grace. See FCC 85M-2343, released June 4, 1985; FCC 85M-2386, released June 7, 1985; FCC 85M-3047, released August 6, 1985; FCC 85M-3184, released August 15, 1985; and FCC 85M-3319, released August 27, 1985.

4 "Congress clearly recognized that sound regulation has procedural as well as substantive elements, and that 'the public interest, convenience, and necessity' comprehends both. Orderliness, expedition, and finality in the adjudicative process are appropriate weights in the scale as reflecting a public policy which has authentic claims of its own". See Valley Telecasting Co. v. FCC, 118

SO the Motion to Accept Proposed Findings of Fact and Conclusions of Law that Comuni-Centre Broadcasting filed on September 23, 1985, IS DENIED;

The Request for Official Notice that Comuni-Centre proffered on September 23, 1985, IS REJECTED;

The Motion to Dismiss that Range Communications, Limited Partnership filed on September 17, 1985, IS GRANTED; and

Comuni-Centre Broadcasting, Inc.'s application (BPCT-840921KQ) IS DISMISSED with prejudice.

FEDERAL COMMUNICATIONS COMMISSION

s/ Walter C. Miller

Walter C. Miller
Administrative Law Judge

U.S.App.D.C. 410, 336 F.2d 914 (1964).

Before the
Federal Communications Commission
Washington, D. C. 20554

In re Applications of	)	
	)	
CUBAN-AMERICAN LIMITED et al.	)	MM Docket No. 85-27
	)	
For Construction Permit For a New Television Station on Channel 35 Miami, Florida	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 11, 1985;
Released: December 17, 1985

By the Review Board:

1. The Review Board has under consideration an appeal filed October 29, 1985 (and supplemented on October 30, 1985) by Comuni-Centre Broadcasting, Inc. (Comuni-Centre) from a Memorandum Opinion and Order released October 8, 1985 (FCC 85M-3938) by presiding Administrative Law Judge (ALJ) Walter C. Miller. That ruling

dismissed Comuni-Centre's application with prejudice for failing to show good cause, pursuant to Section 1.263(c) of the Commission's Rules, 47 C.F.R. 1.263(c), for filing its proposed findings of fact and conclusions of law 12 days after the mandated deadline. The ALJ concluded that Comuni-Centre's "dilatory tactics" were typical of its conduct throughout the proceeding, that the delay had prejudiced the rights of the 12 other applicants who timely filed, and that it would be deemed a waiver of Comuni-Centre's right to participate further, citing James E. Reese, 45 FCC 2d 315, 29 RR 2d 903 (Rev. Bd.), rev. denied, FCC 74-634 (Comm'n 1974). FCC 85M-3938, supra, at paras. 9, 10 and n. 2. Oppositions to the appeal have been filed by competing applicants Range Communications, Limited Partnership; Minority Broadcasting Corporation, Inc.; Lamar Communications, Inc.; First Latin

Women Broadcasting, Inc.; Miami Broadcasting, Inc.; and Grace Broadcasting Network, Inc. We affirm the dismissal of Comuni-Centre's application.

2. Comuni-Centre's appeal presents two questions -- whether the ALJ acted within the scope of his authority under Section 1.263(a) of the Rules, 47 CFR 1.263(a), in setting September 11, 1985 as the filing deadline for proposed findings herein, and whether he properly exercised that authority when he denied Comuni-Centre's September 23, 1985 motion to accept its late-filed findings and dismissed its application. As to the filing date, Comuni-Centre strenuously argues that the 55 days allowed between July 18, 1985 -- the last day of hearing and the day that the record was closed -- and September 11 did not, as a matter of law, constitute the "reasonable opportunity" to submit proposed findings envisioned by

Section 8(b) of the Administrative Procedure Act of 1946, 5 U.S.C. 557(c). In support, it presents a study of 80 FCC adjudications over the last two years, in only 28 of which findings were required to be filed in 55 days or less after the close of the record, and points out that all of those cases had much shorter transcript records (27-1346 pages versus the 4325 pages in the instant case). Comuni-Centre asserts that, given its mammoth task, the 67 days it took to submit its findings were reasonable per se.

3. We reject Comuni-Centre's lesson in legal mathematics. The most telling statistic, which it did not emphasize, is that, regardless of how arduous the task, all 12 of its opponents managed to meet the September 11 deadline. We further note that the September 11 date itself represented an extension of time from a previous September 4 deadline; that the

extension request, granted in part by Order, FCC 85M-3409, released August 30, 1985, was initiated by Comuni-Centre, which actually petitioned for a September 18 filing date; and that Comuni-Centre even missed that self-imposed deadline by five days. Finally, we observe that Section 1.263(a) of the Rules establishes 20 days after the record is closed as the standard filing time for proposed findings in Commission proceedings "unless additional time is allowed". Id. Here 35 additional days were given. Moreover, the ALJ had alerted all parties as early as June 25, 1985 about the need to begin working on their findings then and not to wait until the hearing ended in July. Tr. 4038. Indeed, more than 90% of the hearing transcript had transpired by that date. Yet Comuni-Centre counsel concede that it did not commence work on the findings until August 21, 1985, only two

weeks before the original due date. It's no wonder that counsel felt obliged to seek a two-week extension (see above) on August 28. Under such circumstances, we are unable to conclude as a matter of law that the September 11 filing deadline was unreasonably short.

4. Comuni-Centre urges, in the alternative, that even if the September 11 date was theoretically adequate, the ALJ erred in holding that Comuni-Centre lacked good cause for its 12-day filing delay. We have carefully reviewed the showing proffered by Comuni-Centre in its September 23, 1985 motion to accept its findings and affirm the ALJ's conclusion that Comuni-Centre failed to show good cause for its dilatoriness under the applicable "special circumstances" standard. See James E. Reese, supra (10-day-late findings rejected where special circumstances not present); Joseph M. Ripley, Inc., 18

RR 217, 222 and 18 RR 363 (1959) (lengthy illness of counsel during findings preparation period was not special circumstances). Comuni-Centre's motion vaguely details a number of work priority reasons why counsel could not begin preparation of the subject findings until August 21, 1985, but leaves unanswered why additional staff was not enlisted or priorities otherwise arranged. In addition, no explanation is offered for counsel's failure to keep the ALJ apprised about its work efforts as the September 11 deadline approached and passed; no further extension was requested, and counsel did not even meet its September 18 self-imposed filing goal (see paragraph 3, supra). Finally, we agree with the ALJ that Comuni-Centre's unauthorized filing delay gave it an unfair opportunity to review the timely filings of its 12 opponents and disrupted its opponents preparation of

reply findings. Contrary to Comuni-Centre's rejoinder, what concerned the ALJ (and us) is not the possibility that Comuni-Centre might adopt the findings or conclusions of others, but rather that it had an unauthorized extra opportunity to rebut its opponents' arguments when fashioning its original findings and conclusions, as well as in preparing its reply findings and conclusions. As to disrupting the reply process, we note Minority Broadcasting Corporation's assertion that no applicants addressed Comuni-Centre's findings in their replies, even though those findings had not yet been rejected by the ALJ when replies were due on October 3, 1985. Thus, although its opponents technically had ten days to address Comuni-Centre's findings, the apparent absence of any replies (a most unusual event) certainly implies that Comuni-Centre's tardiness indeed had a

confusing and disruptive effect on this proceeding. Were we to accept Comuni-Centre's findings now, we would feel obliged to set a special reply date to overcome this disruption, which would, in turn, create further disruption.

5. We are cognizant of the dangers in applying the "blunderbuss" of dismissal on account of procedural deficiencies.[1] However, we must also be sensitive to the administrative imperatives of multi-party proceedings, such as the instant case, and to the wages of a cavalier attitude toward the hearing process. In Community Coalition for Media Change, 646 F.2d 613, 616 and n. 3 (D.C.Cir. 1980), the Court criticized the appellant's "ultra-casual

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1 See WADECO, Inc. v. FCC, 628 F.2d 122, 133 (D.C.Cir. 1980) (Dissenting opinion of Mikva, J. inveighing against indiscriminate use of "blunderbuss of disqualification" in other than egregious applicant misconduct cases).

method of proceeding . . . [which] impedes the just, speedy, and inexpensive disposition of judicial business" and opined that dismissal of the appeal might have been appropriate because of the "conspicious disregard . . shown for case-processing rules". There, as here, petitioner failed to file its pleadings within the extended time allowed by the tribunal and ultimately responded only in the wake of a motion to dismiss.[2] And there, as here, a pattern of casual and dilatory conduct was noted by the tribunal. Thus, our action herein is not based on the type of inconsequential, trivial, or oherwise excusable single lapse toward which the Court noted dis-

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2 In the instant case, the ALJ's dismissal of Comuni-Centre's application was partially in response to Range Communications' September 17 motion to dismiss. This motion apparently triggered the September 23 filing of Comuni-Centre's findings as well as its opposition to the motion.

approval of the drastic remedy of dismissal in Jackson v. Washington Monthly Co., 569 F.2d 119 (D.C.Cir. 1977). We commend the ALJ for his expert and expeditious handling of this complex proceeding, also see Mobilfone Communications, 95 FCC2d 668, 673 n. 4 (Rev. Bd. 1983), rev. denied, FCC 84-610 (Comm'n 1984), aff'd per curiam, No. 85-1005 (D.C.Cir. November 29, 1985), and hold that Comuni-Centre's serious and prejudicial filing dilatoriness, which was several months in the making and typical of a general intractability in this proceeding, has caused it to forfeit its right to participate further.[3] James E. Reese, supra.[4]

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3 We distinguish this decision from our companion action in Horizon Community Broadcasters, Ltd., FCC 85R-100, also released today, in which we reversed the dismissal of an application where the belated proposed findings were submitted only six days late, allegedly due to a substantial computer malfunction, no pattern of intractable conduct was established, and the

6. ACCORDINGLY, IT IS ORDERED, That the Appeal From Ruling Dismissing Application with Prejudice, filed by Comuni-Centre Broadcasting, Inc. on October 29, 1985 and supplemented on October 30, 1985, IS DENIED.

ALJ acted without waiting for the applicant's response to the dismissal motion.

4 In Community Coalition for Media Change, supra, at 616 n. 3, the Court noted that where dismissal would unfairly penalize clients for the neglect of their attorneys, measures directed against dilatory counsel are available, citing Butler v. Pearson, 636 F.2d 526 (D.C.Cir. 1980), in which counsel was ordered to pay the reasonable expenses of the litigation which his neglect had engendered. Here, we do not believe that Comuni-Centre may properly escape responsibility for its counsel's dilatoriness, since the filing deadline and prior litigation history were known (or should have been known) by the applicant's principals as well as its counsel. See Vela Broadcasting Co., FCC 85R-93, released November 15, 1985 (Rev. Bd.).

FEDERAL COMMUNICATIONS
COMMISSION

s/Jerold L. Jacobs

Jerold L. Jacobs
Member, Review Board

Before the
Federal Communications Commission
Washington, D. C. 20554

MM Docket No. 85-27

CUBAN-AMERICAN LIMITED et al. File No. BPCT-840921KE

For Construction Permit for a
New Television Station on
Channel 35
Miami, Florida

ORDER

Adopted: October 24, 1986;
Released: November 5, 1986

By the Commission: Commissioner Quello concurring in the result.

1. The Commission has before it: (a) an Application for Review of a Review Board Memorandum Opinion and Order, 102 FCC 2d 1238 (1985), filed January 16, 1986, by Comuni-Centre Broadcasting, Inc. (Comuni-Centre);[1] (b) an Opposition to

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1 We have accepted and considered the declarations of Comuni-Centre's counsels that they did not review the

(a) filed January 29, 1986, by Miami Latino Broadcasting Corp. (Miami Latino), Coiral Way Broadcasting, Ltd., and Grace Broadcasting Network, Inc.; (d) Erratum and Motion to Supplement Application for Review [2] filed March 26, 1986, by Comuni-Centre; and (e) an Opposition to (d) filed

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timely-filed proposed findings of the other applicants before filing Comuni-Centre's late-filed proposed findings, except to the extent that they have indicated. (See footnote 1 of Comuni-Centre's Motion to Accept Proposed Findings of Fact and Conclusions filed September 23, 1985). Nevertheless, we find the Board's failure to acknowledge counsels' declarations to be harmless error and reject Couni-Centre's contention that counsels' forebearance in this respect significantly undercuts the Board's determination that acceptance of the late-filed pleadings would have a disruptive effect on the proceeding.

2 Since Comuni-Centre's motion is essentially a Reply to Oppositions filed against Comuni-Centre's Application for Review, it is an unauthorized pleading. See Section 1.115(f) of our Rules. Therefore, we shall deny Comuni-Centre's Motion to Supplement Application for Review.

April 4, 1986 by Miami Latino. The Review Board opinion at issue affirmed the dismissal of Comuni-Centre's application by the Presiding Law Judge.[3]

2. IT IS ORDERED, That, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(g) of the Commission's Rules, the Application for Review filed January 16, 1986, by Comuni-Centre Broadcasting, Inc. IS DENIED.[4]

3. IT IS FURTHER ORDERED, That the Motion to Supplement Application for Review filed March 26, 1986, by Comuni-Centre Broadcasting, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William J. Tricarico
Secretary

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3 FCC 85M-3938, released October 9, 1985.

4 See also Hillebrand Broadcasting, Inc., FCC 86-426, adopted October 24, 1986.

FCC 87I-062

Before the
Federal Communications Commission
Washington, D. C. 20554

In re Applications of:	)	
	)	
CUBAN-AMERICAN	)	MM Docket No.
LIMITED, et al.	)	85-27
	)	
For Construction Permit	)	
For a New Television	)	
Station on Channel 35	)	
Miami, Florida	)	

O R D E R

Adopted: June 15, 1987
Released June 16, 1987

1. Before the Commission for consideration are (a) a "Petition for Reconsideration" filed December 5, 1986 by Comuni-Centre Broadcasting, Inc. (Comuni-Centre); (b) an opposition filed December 18, 1986 by First Latin Women Broadcasting, Inc.; (c) an opposition filed December 18, 1986 by Grace Broadcasting Network, Inc.; (d) an opposition filed December 18, 1986 by Miami Latino Broadcasting Corporation and (e) a "Reply to

Oppositions to Petition for Reconsideration" filed January 5, 1987 by Comuni-Centre.

2. This proceeding involves twelve mutually exclusive applications for authority to construct and operate a new commercial television station on Channel 35 in Miami, Florida. After the evidentiary hearings were completed, the Presiding Administrative Law Judge denied Comuni-Centre's motion to accept findings of fact and conclusions of law, which were filed twelve days after the due date, and dismissed Comuni-Centre's application. See Memorandum opinion and Order, FCC 85M-3938, released October 9, 1985. The ALJ held that Comuni-Centre had failed to show good cause for filing its proposed findings late, had prejudiced the rights of other applicants and had waived its right to participate further in the proceeding. The Review Board affirmed the ALJ's dis-

missal order, Cuban-American Limited, 1 FCC Rcd 449 (1986). Comuni-Centre now seeks reconsideration of that denial.

3. Comuni-Centre raises three issues in its petition for reconsideration. First, it alleges that, under the Communications Act and Administrative Procedure Act, it is illegal for the Commission to dismiss an application which has been prosecuted through hearing and that the Administrative Law Judge is required to render a decision on the merits of the application. Second, citing Public Media Center v. F.C.C., 587 F.2d 1322 (D.C.Cir. 1978), Comuni-Centre claims it was denied comparable treatment with applicants who filed incomplete or inaccurate findings. Third, Comuni-Centre contends that it was error for the Board to find that acceptance of Comuni-Centre's proposed findings would have been disruptive to the proceeding since this

argument was first raised in an opposition pleading to which Comuni-Centre was denied the right to respond.

4. The standard for a petition for reconsideration is set forth in Section 1.106(b) of the Commission';s Rules which provides, in part, as follows:

> (2) Where the Commission has denied an application for review, a petition for reconsideration will be entertained only if one or more of the following circustances is present:
>
> > (i) The petition relies on facts which relate to events which have occured or circumstances which have changed since the last opportunity to present such matters; or
> >
> > (2) The petition relies on facts unknown to petitioner until after his last opportunity to present such matters which could not, through the exercise of ordinary diligence, have been learned prior to such opportunity.
>
> (3) A petition for reconsideration of an order denying an application for review which fails to rely on new facts or changed

circumstances may be dismissed by the staff as repetitious.

Comuni-Centre contnues to argue matters previously considered by the Commission. Its current pleadings contain no new facts relating to events wqhich have occured or circumstances which have changed since the last opportunity to present such matters, nor do they contain any facts which could not with ordinary diligence have been presented at an earlier stage of this proceeding. Because Comuni-Centre has previously had full opportunity to present its case on these matters, the public interest will be best served by dismissal of the instant pleading without further consideration.

5. ACCORDINGLY, IT IS ORDERED, Pursuant to authority delegated under Sections 0.251(f)(10) and 1.106(b)(3) of the Commission's Rules, that the Petition for Reconsideration, filed December 5,

1986 by Comuni-Centre IS DISMISSED.[1]

s/Diane S. Killory

Diane S. Killory
General Counsel

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1 Comuni-Centre's reliance on Eagle Broadcasting Co. v. F.C.C., 514 F.2d 854 (D.C.Cir. 1975) (reliance by the Commission on its own rule against reconsideration is itself an inadequate reason for refusal to rehear), and Crosthwait v. F.C.C., 584 F.2d 550 (D.C.Cir. 1978) (the Commission improperly invoked its procedural regulations as a basis for declining reconsideration) as precluding the action taken herein is without merit. The deficiencies in the Commission's Rules governing the dismissal of petitions for reconsideration, as noted by the court in those cases, have been rectified. See Memorandum Opinion and Order, 44 FR 60291, 46 RR2d 524 (1979), which amended Section 1.106 of the Commission's Rules.

In the
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COMUNI-CENTRE BROADCASTING, INC.,	)	
	)	
Appellant,	)	
	)	
v.	)	**Case No. 87-1331**
	)	
FEDERAL COMMUNICATIONS COMMISSION,	)	
	)	
Appellee	)	
	)	
and	)	
	)	
MIAMI 35 CORP.,	)	
	)	
MIAMI LATINO BROADCASTING CORPORATION,	)	
	)	
FIRST LATIN WOMEN BROADCASTING, INC.,	)	
	)	
Intervenors	)	

PETITION FOR REHEARING
AND
SUGGESTION FOR REHEARING EN BANC

Comuni-Centre Broadcasting, Inc. (hereinafter, "Comuni-Centre"), by its

counsel, pursuant to Rule 15 of this Court, respectfully requests rehearing of its appeal in this proceeding and suggests rehearing en banc.

I. CONCISE STATEMENT OF ISSUES AND THEIR IMPORTANCE

Comuni-Centre was an applicant in a comparative licensing proceeding presently pending decision before the Federal Communications Commission for a new television station at Miami, Florida. Comuni-Centre's application was dismissed in October 1985 following evidentiary hearing because its proposed findings of fact were filed twelve days after the date specified by the presiding Administrative Law Judge.

This case warrants rehearing en banc, by reason of importance, because:

(1) It is, so far as known, a case of first impression regarding the propriety of

dismissal of an applicant in an administrative proceeding, after presentation of its evidence in hearing, and will stand as precedent for such actions in the future.

(2) It raises questions of first impression of (a) the meaning of "reasonable opportunity", as provided in the Administrative Procedure Act, to submit proposed findings and conclusions; (b) the propriety of the rule of the Federal Communications Commission that only "special circumstances" will permit retention of an applicant in hearing status if its proposed findings and conclu-

sions are filed after the date specified, and (c) the propriety of dismissal where other alternatives were available.

II. REQUEST FOR RULINGS

The Appellant raised two serious issues, to wit:

(1) Whether the standard applied by the Commission in dismissing the application of Comuni-Centre, that it must demonstrate "special circumstances" to avoid dismissal of its application, was lawful? Comuni-Centre showed that (a) there is a presumption under the Administrative Procedure Act and the Communications Act that an applicant, **having proceeded through hearing and presented**

its evidence, is entitled to a decision,[1] and that (b) the Commission's requirement that an applicant show "special circumstances" to avoid dismissal of its application after hearing violates that principle. Appellant's Brief, pp. 33-4.

(b) Whether under applicable precedent of this Court, which the Commission's Review Board invoked and the Commission affirmed, there was good

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1 The Court's Opinion treated Comuni-Centre's argument as being only whether, under the A. P. A. and the Communications Act, the Commission has authority to require an applicant to file proposed findings of fact as precondition to receiving a decision on the merits of its application. The Court concluded by way of footnote that it did. Opinion, fn. 19. However, Appellant expressly raised the question of whether, if proposed findings and conclusions are late-filed, the Commission can lawfully apply its standard of "special circumstances" as a precondition to receipt of a decision on the merits of an application. See Appellant's Brief, pp. 2 and 33-4.

cause for dismissal of the application of Comuni-Centre? Comuni-Centre's Brief showed that there were **two** alternatives to such action. Appellant's Brief, pp. 36-7.

Comuni-Centre respectfully requests consideration of its arguments on the foregoing, which were not discussed in the Court's Opinion.

III. THE COURT'S OPINION

Reasonable Opportunity.

The Court's Opinion does not address the right which Comuni-Centre enjoyed under the Administrative Procedure Act (5 U.S.C. §557(c)) to a "reasonable opportunity" to file its proposed findings and conclusions. The Opinion, rather, merely paraphrases selected views of the Commission's Review Board (Opinion, page 8; J. A. 417-8) to the effect that Comuni-

Centre offered no explanation of why the work priorities of its counsel could not have been rearranged or additional staff retained, ending with the observation that the counsel to all other parties managed to file within the period allowed. There is no discussion of the countervailing facts stated in the Review Board's opinion, and no attempt to determine what is a reasonable opportunity or, directly in point, what is a sufficiently short period of time to warrant something other than dismissal for inability to meet it.

It is clear that the mere fact that other counsel in the proceeding managed to meet the date specified for the filing of proposed findings and conclusions does not make the time allowed "reasonable". Such a rule would lead merely to exclusion of those who cannot meet the schedule set and, thus, to a form of tyranny of the

majority. Obviously, if a party has the right to a reasonable opportunity, that right is not to be eliminated by what amounts to the majority vote of competing applicants.

The Court failed to even consider the facts in the record indicating that the time allowed was not reasonable. First, even the Review Board characterized it as "short". J. A. 418, at para.3. Second, there was the ample statistical evidence- referenced in the Review Board's opinion but not even mentioned by the Court - that the time allowed was egregiously short and plainly not reasonable. J. A. 369-70, 375-6, 417-8 at para. 2. Third, despite the fact that the basic and laborious work of digesting the record, collating the citations to the record and exhibits, and preparation of proposed findings was done for him by the parties, it still took the

presiding A. L. J. **98 days** from the filing of proposed findings and conclusions (September 11, 1985) to issue his initial decision (December 18, 1985 - J. A. 421-2), i.e., nearly twice the time he allowed the parties. Fourth, the Court is well aware of the time provided, for example, to brief cases submitted to this Court, which always far exceeds that allowed here. Finally, this Court required six months (specifically, 183 days) from the date of oral argument (March 17, 1988) to prepare and issue a mere 12 page Opinion in this case. Comuni-Centre, by comparison, utilized only 67 days to digest a 4,325 page record and 140 exhibits, and prepare and file proposed findings and conclusions of 98 pages.

The evidence is overwhelming that the time allowed for the preparation and filing of proposed findings and conclu-

sions on the massive record of this case was not reasonable. There is no significant evidence pointing to any other conclusion. The Court should so find (or, at a minimum, hold that the time was so short that dismissal of the application of Comuni-Centre for failing to meet it is not warranted).

Dilatory Conduct.

The Court's Opinion sets forth in detail the facts of Comuni-Centre's alleged "dilatory conduct" in only a single instance, that of its request for official notice of the determination of "no hazard" by the F. A. A., filed September 23, 1985. That single alleged instance, however, is critical to the premise of a pattern of dilatory conduct since all other instances of alleged dilatory conduct occured on or before April 24, 1985, i. e., five months (less a

day) before. The entire hearing had been conducted in the meantime and there has never been an allegation by anyone that Comuni-Centre failed in any respect to timely meet all its obligations in that period.

The Court's Opinion states regarding this matter as follows (Opinion, p. 10):

> The clearance was issued on September 9, but Comuni-Centre did not present it to the Commission until September 23, and even then without explanation for the delay.

This is invention by the Court: **no one has ever suggested that there was any delay in the submission of the F. A. A. clearance following its issuance by the F. A. A.**

Initially, the notion reflected in the Opinion that the clearance was "present(ed) to the Commission" by Comuni-Centre apparently is premised on a conceptual error. The clearance in this and all

cases is "present(ed) to the Commission" by the issuing agency, the F. A. A. Upon issuance of a "no hazard" determination for a broadcast tower, the F. A. A. sends a copy directly to the Commission.[2]

Second, the only need presented by the issuance of the "no hazard" determination for the tower proposed by Comuni-Centre was for its submission in the hearing proceeding in which Comuni-Centre's application was involved.[3] The presiding Administrative Law Judge had

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2 This is reflected in the F. A. A. notice issued to the Appellant which reads, in pertinent part, as follows (J. A. 308):

> If the structure is subject to the licensing authority of the FCC, a copy of this determination will be sent to that Agency.

3 The time for submission of new or changed facts is provided in Section 1.65 (47 C.F.R. §1.65) of the Commission's Rules. It is that the submission should be as soon as possible and, in any event, within 30 days.

been advised that the F. A. A. determination for Comuni-Centre's proposed tower was expected to be issued not long after August 11, 1985 (J. A. 149). Thereafter the presiding Administrative Law Judge indicated, in connection with the incipient closing of the record, that he would allow as much time as possible for applicants to obtain their F. A. A. clearances and, if possible, he would consider them to the time when he wrote his initial decision.[4] Comuni-Centre's F. A. A.

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4 The Judge stated, in pertinent part, as follows (J. A. 151-2):

> In other words, what I have tried to do in different - - every applicant that comes before me, if he doesn't have this clearance I try to give him as much running room as I could possibly give him before I finally have to say, "Okay, you've had all the time. I can't give you anymore time, we've run out". Now that could be the time I write proposed findings, when I write my ID.

clearance was filed pursuant to its earlier advice to the presiding Administrative Law Judge that it was forthcoming and pursuant to the judge's invitation implicit in his advice that he likely would consider them until his initial decision was written. It was completely proper.[5]

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5 The Court's Opinion also faults Comuni-Centre for the mode of its filing of its F. A. A. clearance with the Administrative Law Judge, by request for official notice. Opinion, page 10. Since, as noted above, the F. A. A. clearance was a document on file with the Commission, a request for official notice was an indisputably correct method to bring it into the record of the proceeding. Further, the last action taken by the judge on an F. A. A. notification was to grant a request for official notice of it, on September 3, 1985. J. A. 177-8. Comuni-Centre should be forgiven if its counsel reasonably took that as a signal that a request for official notice of F. A. A. determinations was equally acceptable to the judge. It may be noted that the judge, subsequent to the filing of proposed findings and conclusions in this proceeding, took official notice of a dismissal in a civil action (Certified List of Items in

Requests for Acceptance.

The remaining support for the Court's finding of a "pattern of procrastination" is the fact that on several occasions Comuni-Centre was required to request acceptance of pleadings, some filed as little as one day late. At the outset, it should be pointed out that only two of them were for as much as two days. The rest were for one day.

Every one of those pleadings was

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the Record, page 60) and of an application of one of the applicants in this proceeding, in order to repair of an otherwise fatal defect in the applicant's evidence. Copy attached.

In any event, if the judge required Comuni-Centre to proceed by motion to reopen the record, Comuni-Centre's request for official notice could have been so construed. The name on the pleading is not definitive where the nature of the request - in this instance, to add new information to the record - is clear.

discretionary: none were required to be filed. Every motion for acceptance was granted immediately, premised on good cause shown. It is unprecedented that those granted requests for acceptance in March and April 1985 should be resurrected in October 1985 to charge ex post facto- without prior notice or warning - that those motions demonstrate "procrastination" (Opinion, para. 10) or "dilatory conduct" (Opinion, page 12). It is equally unprecedented that the Court would publish (or sustain) such a holding - as a ground for dismissal after hearing - without explication of the facts, which never has occured. The facts do not indicate any dereliction.

All of the motions occured in a relatively brief period of intense pre-hearing activity in this case. Two motions requested acceptance of, respec-

tively, motions to produce documents and notices of depositions, filed one day after the date which had been specified by the presiding Administrative Law Judge. Comuni-Centre filed six motions for production on the date specified, March 20, 1985 ("Certified List of Items in the Record" (hereinafter, "Certified List"), pages 8, 9, 12 & 14). The two motions for acceptance noted that the remaining motions to produce and the notices of depositions all were completed for filing on the date specified. The motion for acceptance of Comuni-Centre's deposition notices stated the facts, to wit, that, in all, "**forty-nine separate, multiple-page pleadings [were] prepared on that date for filing on that date** . . (J. A. 50). It continued as follows (J. A. 51):

> [D]ue to the large number of parties . . required to be served and the much larger number of motions and notices required to be duplicated for

> service on all parties on the same date, an enormous and unforeseen duplicating requirement arose. As a result, it was impossible to complete duplicating, collating and packaging the hundreds of copies of motions and notices required on the 20th.

The record also reflects that on March 21, 1985, one day late, another applicant, Adib Eden, filed 15 motions for production of documents (Certified List, supra, pages 16, 18-9) and that another applicant, Grace, filed a motion for production two days late, on March 22, 1985 (Certified List, supra, page 18). These parties did not even file motions for acceptance. Their late-filed motions were granted. Certified List, p. 28. It thus appears that the motions for acceptance a day late filed by Comuni-Centre were superfluous.

On March 25, 1985, the same day that one of the foregoing superfluous motions

was filed, Comuni-Centre filed a major Petition for Leave to Amend. J. A. 14-49. On March 26, Comuni-Centre filed three oppositions to notices to depose its principals. Certified List, page 19. On March 28, 1985, Comuni-Centre filed seven petitions for enlargement of issues. Certified List, pages 21 & 23. On March 29, 1985, Comuni-Centre filed three more petitions to enlarge the issues accompanied by motions for acceptance one day late. Certified List, pages 24-5. The motions stated that the petitions were completed and served on the parties on the due date but, due to the number of petitions involved (10 in all, more than by any other party) the three could not be completed and duplicated for filing prior to the close of the Office of the Secretary of the Commission. Section 1.229(b) of the Commission's Rules (47 C.F.R. §1.229(b)) expressly provides for filing

petitions to enlarge issues after the period provided in that rule, with a showing of good cause. Comuni-Centre properly proceeded pursuant to that rule.

On April 4, 1985, Comuni-Centre filed four "declarations of no consideration". Certified List, page 29. On April 5, 1985, Comuni-Centre filed objections and a motion to quash a request for admissions. Certified List, page 30. On April 11, 1985, Comuni-Centre filed its opposition to a petition to enlarge issues, together with a motion to accept the same one day late. Another applicant did the same and a third filed one day late without bothering to file a motion requesting acceptance. Certified List, page 36; J. A. 64-5. Comuni-Centre's motion for acceptance pointed out that its counsel had been engaged in the preparation for, and conduct of another hearing which commenced on

April 8, and that its opposition had been filed as promptly as possible.

On April 15, 1985, Comuni-Centre filed a "declaration of no consideration". On April 17th, Comuni-Centre filed a reply pleading. Certified List, page 38. On April 22nd, Comuni-Centre filed another reply pleading. On the 23rd, Comuni-Centre filed yet another reply pleading. Certified List, page 40. Finally, on the 24th two reply pleadings were filed with motions for acceptance two days late. Certified List, page 40; J. A. 68-71. The motions noted the foregoing pleadings prepared and filed, including on the preceding day, the 23rd; that lead counsel for Comuni-Centre was in Miami, Florida, participating in the depositions in this proceeding on the 17th through 19th, and that the then on-going renovations of counsel's office had made it difficult to

maintain a high level of work output.

It is respectfully submitted that the foregoing demonstrate intense activity and diligence, and that there is absolutely nothing in it which indicates any lack of diligence or pattern of procrastination.

Prejudice to Other Parties.

The Court has recognized that the Review Board's conclusions on this issue are erroneous. Opinion, pages 9-10. Nevertheless, the Court has undertaken to write a new analysis in order to support the Commission's dismissal of Comuni-Centre's application. This is not the Court's function.

The Review Board acknowledged that all other applicants had ten days to file replies, if they so desired, to Comuni-Centre's proposed findings of fact and conclusions. J. A. 419. It stated,

however, that disruption to competing applicants might be implied from the fact that none filed reply findings directed to the proposed findings and conclusions submitted by Comuni-Centre. That implication had some plausibility based on the reasonable expectation that some applicant would find something concerning it in Comuni-Centre's proposed findings and conclusions to which it would wish to respond.

No such implication follows, however, from the mere fact that a small minority of the other applicants filed nothing in response to Comuni-Centre's proposed findings and conclusions. Reply findings are optional; they are utilized only when there is something found in the findings or conclusions submitted by others which has not previously been addressed. There is nothing surprising at all - indeed, it

is to be expected - that some parties would have found nothing in Comuni-Centre's proposed findings and conclusions which required any further proposed findings or conclusions from them. The Court's substitution of such a holding-which the Review Board did not purport to make - is error.[6] [7]

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6 Equally without merit is the Court's holding that the other parties could have been prejudiced by the "abbreviated time period" for submission of reply findings. The Review Board acknowledged that they had ten days to do so in terms indicating that there was nothing inadequate with that. J. A. 419, para. 4.

7 Also erroneous is the implication contained in the Court's remark that several parties referred "at least cursorily" to Comuni-Centre's proposed findings and conclusions. The object of reply findings is to submit proposed findings of fact and conclusions. It is not their function to argue the merits of proposed findings and conclusions submitted by others. Cursory reference, merely to identify the proposed findings or conclusions to which the replies are recommended as alternatives or additions (and make clear that they are not merely late-filed

Alternatives to Dismissal.

The Court has failed in entirety to discuss the fact that there were ample alternatives to the dismissal visited upon Comuni-Centre by the presiding Administrative Law Judge. In an opinion released the same day as that with respect to Comuni-Centre, the Review Board ruled that the presiding officer could have granted a slight extension in the time for submission of reply findings and conclusions, which would have obviated any possible prejudice. Horizon Community Broadcasters, Ltd., 102 F.C.C.2d 1267, 59 R.R.2d 548 (Rev. Bd. 1985).

Finally, the presiding Administrative

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initial proposed findings and conclusions), is the most that normally would (or should) appear. See, e. g., the Reply Findings and Conclusions of Comuni-Centre at J. A. 354-8.

Law Judge could have simply rejected the proposed findings and conclusions submitted by Comuni-Centre, as he proposed to do with any findings and conclusions which, in his judgement, were inadequately prepared. J. A. 165. It was wholly unnecessary, in addition, to dismiss Comuni-Centre in entirety from the proceeding. Such action was an abuse of discretion and should be reversed.

Respectfully submitted,

COMUNI-CENTRE BROADCASTING, INC.

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October 31, 1988

* * * *

(Attached Memorandum Opinion and Order by Administrative Law Judge Walter C. Miller, FCC 85M-4189, released October 29, 1985, omitted).

CERTIFICATE OF SERVICE

The undersigned, an attorney at law admitted to practise before the Supreme Court of the United States, certifies that he has, this 16th day of February 1989, deposited copies of the foregoing, "Appendix to Petition for Writ of Certiorari", in the U. S. Mail, first class postage paid, addressed as follows:

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